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No. _____

IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION ..... *Petitioner*

vs.

JOHNNY LEE NELSON ..... *Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTION PRESENTED

WHETHER, IN A CRIMINAL CASE, AN APPELLATE COURT, AFTER HOLDING THAT CERTAIN EVIDENCE WAS IMPROPERLY ADMITTED AGAINST THE DEFENDANT, SHOULD DETERMINE THE SUFFICIENCY OF THE STATE'S CASE BY CONSIDERING ALL THE STATE'S PROOF THAT WAS ADMITTED INTO EVIDENCE OR BY CONSIDERING ONLY THE REMAINDER OF THE STATE'S PROOF THAT HAD BEEN PROPERLY ADMITTED INTO EVIDENCE.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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A. L. Lockhart, Director, Arkansas Department of Correction, the petitioner, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

## OPINION BELOW

The opinion of the United States Eighth Circuit Court of Appeals is reported as *Lockhart v. Nelson*, 828 F.2d 446 (1987), and is reprinted in the appendix to this petition. The appendix also includes the Eighth Circuit's judgment in this case and an order issued by Justice Blackmun on November 9, 1987, extending the time in which petitioner Lockhart must file his petition for a writ of certiorari up to and including December 31, 1987.

## JURISDICTION

The Eighth Circuit Court of Appeals decided the instant case on September 3, 1987. The Court of Appeals entered its mandate in this case on November 2, 1987. On November 9, 1987, Justice Blackmun granted an extension of time until December 31, 1987, for petitioner to file a petition for a writ of certiorari. This Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ". . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . ."



## STATEMENT OF THE CASE

On March 12, 1982, a jury in Union County, Arkansas, sentenced respondent Johnny Lee Nelson to twenty years imprisonment in the Arkansas Department of Correction. Nelson had pleaded guilty to underlying charges of burglary and theft of property and had agreed to be sentenced by a jury. Nelson was sentenced as an habitual offender pursuant to Ark. Stat. Ann. §§41-1001—03 (Repl. 1977). The State introduced four prior convictions into evidence against Nelson. Pursuant to §41-1001(2) and §41-1003, the State had to prove beyond a reasonable doubt that Nelson had four prior felony convictions in order to make him eligible for sentencing as an habitual offender. Both the State and Nelson's trial counsel had failed to discover that Nelson had received a gubernatorial pardon for one of the prior convictions. The pardon was of great significance because pardoned prior convictions are inadmissible in Arkansas in habitual offender sentencing proceedings. *See Duncan v. State*, 254 Ark. 449, 452, 494 S.W.2d 127, 129 (1973). The trial court admitted the prior conviction that had been pardoned into evidence because Nelson's trial counsel did not know that the prior conviction had been pardoned and, therefore, did not ask the trial court to rule that it was inadmissible.

After Nelson was incarcerated in the Arkansas Department of Correction, he decided to challenge the validity of his guilty plea. After exhausting his available state court remedies, Nelson filed a petition seeking relief pursuant to 28 U.S.C. §2254 in Federal District Court for the Eastern District of Arkansas. Lockhart moved to dismiss Nelson's petition seeking habeas corpus relief. Upon the order of the District Court, Lockhart's counsel made inquiries, discovered the existence of Nelson's pardon and supplemented Lockhart's motion to dismiss to admit the existence of a pardon for one of

the prior convictions that had been admitted into evidence against Nelson.

After learning of the existence of the pardon the District Court issued a preliminary order on September 20, 1985, in which it held that Nelson was entitled to be resentenced. The District Court appointed counsel to advise Nelson of the risk of going forward with the resentencing. Nelson's appointed counsel filed a response to a subsequent order by the District Court in which he raised the possibility that Nelson may have a Fifth and Fourteenth Amendment former jeopardy defense to any effort by the State to resentence him as an habitual offender. In response to this argument by Nelson's appointed counsel, the District Court issued an order on June 6, 1986 (published as *Nelson v. Lockhart*, 641 S. Supp. 174 [E.D. Ark. 1986]), in which the District Court held that Nelson did have a former jeopardy defense that barred any effort by the State to resentence him as an habitual offender. The Eighth Circuit Court of Appeals affirmed the District Court's order in *Lockhart v. Nelson*, 828 F.2d 446 (1987). Petitioner Lockhart seeks a petition for a writ of certiorari from this Court to review the decision of the Eighth Circuit Court of Appeals that respondent Nelson has a former jeopardy defense arising from the Fifth and Fourteenth Amendments which bars any effort by the State of Arkansas to resentence him as an habitual offender.



## ARGUMENT

***THIS COURT SHOULD GRANT CERTIORARI AND REVERSE THE EIGHTH CIRCUIT COURT OF APPEALS BECAUSE ITS INTERPRETATION OF THE FIFTH AND FOURTEENTH AMENDMENTS' FORMER JEOPARDY CLAUSE IS IN CONFLICT WITH THOSE REACHED BY A NUMBER OF OTHER FEDERAL CIRCUIT COURTS OF APPEAL AND STATE APPELLATE COURTS IN CASES PRESENTING THE SAME ISSUE.***

This is a *Burks*-type case. *Burks v. United States*, 437 U.S. 1 (1978) holds that for former jeopardy purposes an appellate court's decision that the evidence against a defendant was insufficient is the equivalent of a jury's verdict of acquittal. The instant case presents the issue left open by this Court in *Burks'* companion case, *Greene v. Massey*, 437 U.S. 19, 26 n.9 (1978): once an appellate court has concluded that a criminal defendant's trial should be reversed because the jury received and considered inadmissible evidence, should the court consider the inadmissible evidence and the remainder of the state's proof or should the court consider only the remainder of the state's case in deciding whether the defendant has a Fifth and Fourteenth Amendment former jeopardy right not to be retried because the State failed to put sufficient evidence before the jury.[1] In the instant case the Eighth Circuit Court of Appeals evaluated respondent Nelson's former jeopardy claim by considering only that part of the State's case that had been properly admitted against him.

Specifically, the Eighth Circuit concluded that Nelson's Fifth and Fourteenth Amendment right not to be punished

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[1]The due process clause of the Fourteenth Amendment incorporates the Fifth Amendment's prohibition against placing a defendant twice in jeopardy. *Benton v. Maryland*, 395 U.S. 784 (1969).

twice for the same offense barred the State from resentencing Nelson as an habitual offender because one of the four prior convictions that the jury had considered in sentencing Nelson as an habitual offender was inadmissible, as a matter of state law, in habitual offender sentencing proceedings. There had been no objection at Nelson's state sentencing hearing to the admission into evidence of the inadmissible prior conviction because Nelson's trial counsel failed to realize that the prior conviction was inadmissible.

In refusing to consider all of the State's evidence, inadmissible as well as admissible, in deciding whether Nelson has a former jeopardy right not to be resentenced as an habitual offender by the State of Arkansas, the Eighth Circuit joined five other lower appellate courts that evaluate *Burks*-type former jeopardy claims only on the basis of evidence that was properly before the jury. These lower appellate courts are as follows: *In re M.L.H.*, 399 A.2d 556, 558-59 (D.C. App. 1979); *State v. Bannister*, 60 Haw. 658, 594 P.2d 132 (1979); *State v. Alexander*, 281 N.W.2d 349, 354 (Minn. 1979); *Sloan v. State*, 584 S.W.2d 461, 472 (Tenn. 1978); and *State v. Abel*, 600 P.2d 994, 998-9 (Utah 1979). This disposition of a *Burks*-type former jeopardy issue in cases where evidence was improperly before the jury conflicts with the analytical approach taken by the majority of lower court jurisdictions. The majority of lower appellate courts consider the entire state's case in deciding a *Burks*-type former jeopardy claim where some of the state's evidence was improperly before the jury. This majority of lower appellate courts is as follows: *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 588 n.57 (1st Cir. 1987); *United States v. Marshall*, 762 F.2d 419, 423 (5th Cir. 1985); *Webster v. Duckworth*, 767 F.2d 1206, 1214-16 (7th Cir. 1985); *United States v. Hodges*, 770 F.2d 1475, 1477-78 (9th Cir. 1985); *United States v. Bibbero*, 749 F.2d 581, 586 n.3 (9th Cir. 1984); *United States v. Key*, 725 F.2d 1123, 1127 (7th Cir. 1984); *United States v. Tranowski*, 702 F.2d 668, 671 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984); *United*



*States v. Sarmiento-Perez*, 667 F.2d 1239 (5th Cir.), *cert. denied*, 459 U.S. 834 (1982); *United States v. Harmon*, 632 F.2d 812 (9th Cir. 1980); *United States v. Mandel*, 591 F.2d 1347, 1373-74 (4th Cir.), *aff'd.*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984); *People v. Sisneros*, 44 Colo. App. 65, 606 P.2d 1317 (1980); *State v. Gray*, 200 Conn. 523, 538-40, 512 A.2d 217, 225-6 (1986); *Hall v. State*, 244 Ga. 86, 259 S.E.2d 41 (1979); *People v. Taylor*, 76 Ill.2d 289, 309, 291 N.E.2d 366, 375 (1979); *Mulry v. State*, 399 N.E.2d 413, 419 (Ind. App. 1980); *Commonwealth v. Mattingly*, 722 S.W.2d 288 (Ky. 1986); *Hobbs v. Commonwealth*, 655 S.W.2d 472 (Ky. 1983); *State v. Boone*, 284 Md. 1, 16-7, 393 A.2d 1361, 1369 (1978); *Commonwealth v. Taylor*, 383 Mass. 272, 281-82, 418 N.E.2d 1226, 1233 (1981); *State v. Wood*, 596 S.W.2d 394 (Mo.), *cert. denied*, 449 U.S. 876 (1980); *State v. Verdine*, 290 Or. 553, 624 P.2d 580 (1981); *Roeder v. State*, 688 S.W.2d 856 (Tex. Crim. App. 1985); *Porier v. State*, 662 S.W.2d 602, 606 (Tex. Crim. App. 1984); *State v. Lamorie*, 610 P.2d 242, 346 (Utah 1980); *State v. Van Isler*, 168 W.Va. 185, 283 S.E.2d 836 (1981); and *State v. Frazier*, 162 W.Va. 602, 614-15, 252 S.E.2d 39, 50-3 (1979). The federal courts of appeal and state supreme courts that consider the state's entire case in deciding *Burks*-type cases do so to avoid invading the province of the jury and to make sure that the state has the benefit of correct trial court rulings excluding evidence. As the Fourth Circuit Court of Appeals held in *Mandel, supra*, had the improperly admitted evidence not been admitted, it is impossible to say what other evidence the government might have brought forward or what other theory of the case the government might have pursued. *Id.* at 1374. The procedure followed by the Fourth Circuit Court of Appeals in *Mandel* and in the other lower appellate courts that follow *Mandel* furthers judicial economy because it spares the state from the necessity of overtrying its case by offering into evidence every scrap of proof, no matter how questionable. The state is forced to "throw in the kitchen sink" to avoid reversal and dismissal by

appellate courts that separate the admissible evidence from the inadmissible and review only the admissible evidence in deciding the *Burks* issue. *See Boone, supra* and *Wood, supra*. Professors LaFave and Israel note that the *Mandel* procedure is the better procedure. 3 W. LaFave and J. Israel, *Criminal Procedure*, §24.4 n.29 (1984). As LaFave and Israel observe at page 91 of 3 *Criminal Procedure*, if the *Mandel* rule is not followed, the State has not received "one fair opportunity" to make its proof. Where the state has not received "one fair opportunity" to present its case, former jeopardy considerations do not bar a retrial of the defendant. *Burks, supra* at 15-6. Moreover, the *Mandel* procedure is consistent with *Burks*' literal equation of an appellate court's decision that the state's proof was insufficient with a jury's verdict of acquittal. In *Burks*-type cases like the instant case, the evidence found by the appellate court to be inadmissible had been before the jury and the jury, of course, had no right to find that certain pieces of evidence offered by the state were inadmissible — if an appellate court's decision that the state's evidence was not sufficient is to be a *true* equivalent of a jury's verdict of acquittal for former jeopardy purposes, then appellate courts should consider the same state's case that the jury considered. The continued existence of this conflict among lower appellate courts is unjust — the protection against former jeopardy decided by the Fifth and Fourteenth Amendments cannot be greater for defendants who happen to be tried in the Eighth Circuit Court of Appeals' jurisdiction and lesser for defendants who happen to be tried in jurisdictions that follow the *Mandel* procedure.

The Eighth Circuit attempts to avoid a conflict with the *Mandel* line of cases by noting that in the instant case there was no *Burks*-type "trial error" because the state trial court did not specifically rule on the admissibility of the prior conviction that subsequently turned out to be inadmissible. (A-6) In making this facile distinction, the Eighth Circuit fails to



explain why it is that a defendant's former jeopardy right should depend upon whether his counsel made an objection at trial. Presumably, had Nelson's trial counsel made an objection to the admissibility of the prior conviction that was later discovered to be inadmissible and had this objection been overruled, then the Eighth Circuit would have reversed and remanded. *See Burks* at 15 and *Hobbs v. Commonwealth, supra*. Moreover, the Eighth Circuit's insistence that there can be no trial error in the absence of explicit ruling, albeit erroneous, by the trial court is contrary to this Court's teaching in *Burks* that incorrect *receipt* of evidence is trial error — this Court did not hold in *Burks* that the trial court must explicitly rule on the admissibility of the state's evidence, but held merely that trial error occurs if evidence that is before the jury creates a ". . . judicial process which is defective in some fundamental respect. . . ." *Burks* at 15. There is no doubt that Nelson's jury had before it evidence — the inadmissible prior conviction — that prejudiced him in a fundamental way.

In summary, the instant case gives the Court the opportunity to resolve the issue left unresolved in *Greene v. Massey, supra* and, in so doing, resolve a split of authority between lower state and federal courts of appeal. At present, the existence of this split of authority creates an unjust differential in the level of former jeopardy protection accorded to defendants in criminal cases. Petitioner Lockhart respectfully requests that this Court grant a writ of certiorari to the Eighth Circuit Court of Appeals, reverse that court's decision in *Lockhart v. Nelson*, 828 F.2d 446 (1987) and adopt as a matter of Fifth and Fourteenth Amendment former jeopardy jurisprudence the holding of *Mandel v. United States, supra*, discussed above.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX

**Johnny Lee NELSON, Appellee,**

**v.**

**A. L. LOCKHART, Director, Arkansas Dept. of Correction, Appellant.**

**No. 86-1872.**

United States Court of Appeals, Eighth Circuit.

Submitted April 13, 1987.

Decided Sept. 3, 1987.

Clint Miller, Asst. Atty. Gen., Little Rock, Ark., for appellant.

John Wesley Hall, Jr., Little Rock, Ark., for appellee.

Before LAY, Chief Judge, and ARNOLD and WOLLMAN, Circuit Judges.

LAY, Chief Judge.

Johnny Lee Nelson pled guilty in Arkansas state court to burglary and theft after taking forty-five dollars from a vending machine. He agreed to be sentenced by a jury pursuant to the state's habitual criminal offender act. Ark. Stat. Ann. §41-1001(2)(c) (Repl. 1977). After the state introduced four prior felony convictions, Nelson received a twenty year sentence. The state now concedes that one of the felonies had, in fact, been pardoned. Nelson sought a writ of habeas corpus in the federal district court on the ground that use of the pardoned offense bars a second enhancement proceeding under principles of double jeopardy. The United States District Court for the Eastern District of Arkansas, the Honorable G. Thomas Eisele, Chief Judge, presiding, held that the Double Jeopardy Clause precludes a retrial under the

habitual offender statute.[1] *Nelson v. Lockhart*, 641 F.Supp. 174 (E.D. Ark. 1986). We affirm.

As the district court observed, the Supreme Court held that double jeopardy attaches in a hearing on sentencing where the sentencing procedure "was itself a trial on the punishment • • •." *Bullington v. Missouri*, 451 U.S. 430, 438, 101 S.Ct. 1852, 1858, 68 L.Ed.2d 270 (1981). In the instant case, the district court found that the sentencing procedure constituted a trial on the issue of sentencing. *Nelson v. Lockhart*, 641 F.Supp. at 180. The procedure of introducing evidence of prior convictions "resemble[d] a trial wherein both sides present evidence, examine and cross-examine witnesses, and the prosecution carries the burden of proof beyond a reasonable doubt."[2] *Id.* at 180.

[1]Petitioner was incarcerated on July 22, 1980. On July 24, 1986, subsequent to the issuance of this writ of habeas corpus, petitioner was released on bail by the state court pending this appeal. At the time of his release, petitioner had served six years. The range for punishment under the habitual offenders act is twenty to forty years. Ark. Stat. Ann. §41-1001(2)(c) (Repl. 1977). If the petitioner cannot be sentenced under the act, the range of punishment on the underlying charge is only five to twenty years. Ark. Stat. Ann. §41-901(1)(c) (Repl. 1977).

[2]Under the practice followed in Arkansas, it had been the jury's responsibility to determine if there was adequate proof of the defendant's conviction of prior felonies. The 1977 Replacement to the Arkansas Statutes Annotated, however, changed this so that now the trial court has the responsibility of making a finding as to the defendant's guilt of prior felonies. Ark. Stat. Ann. §41-1005(2) (Repl. 1977). After the prosecutor has introduced evidence of the defendant's guilt of other felonies, the defendant may controvert the prosecutor's proof. *Id.* Although the revised statute was in force at the time of Nelson's trial, the state trial court nonetheless followed the old procedure in submitting the determination of Nelson's guilt of other felonies and his over-all sentencing to the jury. No objection was made by either side and we review the double jeopardy issue under the procedure actually followed.



While conceding that it "erred in introducing into evidence a prior conviction of Nelson's that had been pardoned,"[3] the state argues that this was simply trial error and that the state is entitled to retry petitioner by using proof of other valid convictions. Petitioner contends that double jeopardy bars a second hearing on enhanced punishment.

[1] A defendant cannot invoke immunity from a second prosecution under the Double Jeopardy Clause if the first conviction was reversed due solely to trial error. *United States v. Tateo*, 377 U.S. 463, 465, 84 S.Ct. 1587, 1589, 12 L.Ed.2d 448 (1964). Unlike reversal for insufficiency of evidence, reversal for trial error:

> implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct.

*Burks v. United States*, 437 U.S. 1, 15, 98 S.Ct. 2141, 2149, 57 L.Ed.2d 1 (1977).

[2] In support of its argument that admitting the pardoned conviction was mere trial error, the state urges this court to follow the rule set out in *United States v. Mandel*, 591 F.2d 1347, 1373-74 (4th Cir. 1979), *cert. denied*, 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980). While *Mandel* recognizes the traditional rules that reversal for evidentiary insufficiency precludes granting the government a second opportunity to prosecute, *id.* at 1373, and that reversal for trial error does not preclude a second prosecution, *id.*, *Mandel* applies a special

[3]Under Arkansas law a pardoned conviction may not serve as a basis for sentence enhancement under the recidivist statute. *Duncan v. State*, 254 Ark. 449, 452, 494 S.W.2d 127, 129 (1973).

rule in cases where there is both trial error and insufficient evidence. In those cases, where the trial error was to admit evidence that should have been held inadmissible, *Mandel* suggests that appellate courts not "to adjudicate the sufficiency of the balance of the evidence," *id.* at 1374, because appellate courts should not act as triers of fact. *Id.* at 1374. Whatever the merits or concerns of such a rule, it is settled that if the state fails to provide sufficient evidence to establish the defendant's guilt, then principles of double jeopardy apply. *Burks v. United States*, 437 U.S. at 11, 98 S.Ct. at 2147.

The essence of the Double Jeopardy Clause is that it "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks*, 437 U.S. at 11, 98 S.Ct. at 2147. Thus, if the jury's determination on Nelson's additional sentence was equivalent to a trial on that issue, then a second prosecution is barred under the Double Jeopardy Clause. The district court found that the proceedings had "all the 'hallmarks of the trial on guilt or innocence'." *Nelson v. Lockhart*, 641 F.Supp. at 180 (quoting *Bullington v. Missouri*, 451 U.S. at 439, 101 S.Ct. at 1858). The state had the "burden of proving some factual proposition beyond a reasonable doubt as a predicate to the jury's having discretion to impose a more serious sentence." *Nelson v. Lockhart*, 641 F.Supp. at 180.[4]

*Bullington*, upon which the district court relied in finding that there was a trial on the issue of punishment, states clearly the relevant factors in determining whether the

[4]Arkansas law imposed on the prosecutor the conventional burden of proof to invoke the state's habitual offender statute:

> A previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies the trial court beyond a reasonable doubt that the defendant was convicted or found guilty.

Ark. Stat. Ann. §41-1003 (Repl. 1977).



sentencing hearing constituted a trial on that issue. In *Bullington* the petitioner had been convicted of first degree murder. 451 U.S. at 435, 101 S.Ct. at 1856. The applicable Missouri statute required a pre-sentence hearing of any defendant convicted of capital murder. *Id.* at 433 n. 4, 101 S.Ct. at 1855 n. 4. After hearing argument by the defendant and the prosecutor, *id.* at 433-34, 101 S.Ct. at 1855-56, the jury had to determine if the prosecutor had established aggravating circumstances beyond a reasonable doubt. The jury found Bullington guilty of capital murder and the same jury returned an additional verdict fixing Bullington's punishment at life imprisonment without eligibility of probation or parole for fifty years. *Id.* at 435-36, 101 S.Ct. at 1856-57.

After the jury's verdict was received, Bullington moved for and was granted a new trial.[5] Because there was to be a new trial, the prosecution served notice that it intended to try to obtain the death penalty even though the earlier jury had granted only a life sentence. Bullington moved to strike the notice, arguing that the Double Jeopardy Clause barred "the imposition of the penalty of death when the first jury had declined to impose the death sentence." *Id.* at 436, 101 S.Ct. at 1857.

[3] The Supreme Court found that because the "sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury [was] available to him, with respect to the death penalty, at his

[5]After Bullington filed this motion for a new trial, the Supreme Court held that Missouri's practice of allowing women an automatic exemption from jury service was unconstitutional because it deprived the defendant of his right to a jury drawn from a fair cross section of the community. *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). Relying on *Duren*, the trial court granted Bullington's motion for a new trial.

retrial." *Id.* at 446, 101 S.Ct. at 1862. Under *Bullington*, then, double jeopardy attaches to sentencing proceedings if the process of determining the defendant's punishment was similar to the process of determining guilt. Because the jury's determination of Nelson's sentencing had the same procedural protections as his trial for theft and burglary, we agree with the trial court's holding that the principles of *Bullington* are controlling.

We reject the state's argument for several reasons. First, the facts here show that the state failed to prove that the defendant had been convicted of four felonies. The state proved only three valid convictions and the jury verdict of guilt under the habitual offender act, which requires four felony convictions, was mistaken. Second, the admission of the pardoned conviction was not trial error; the trial court did not rule on the admissibility of the conviction that the defendant claimed was pardoned by Governor Faubus.[6] While the conviction in

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[6]The state seeks to capitalize on this fact by claiming defense counsel was ineffective. This argument borders on absurdity. Based on the trial record, as meticulously set forth by Judge Eisele, the proof of the pardoned conviction was pursued by the state notwithstanding the petitioner's testifying that he had been pardoned for the specific offense in question. The prosecutor stated:

> **PROSECUTOR**: Your Honor, I feel compelled at this time to make a motion to strike this testimony because I think the defendant is in error. I think he's confused as to the meaning of the pardon and a commutation. Now I hesitate to allow the jury to hear this and become confused and I would ask the Court to strike the testimony. It's hearsay — would be another stated objection. I think the records are clear that are in the court and perhaps some comment by the Court to the jury could clear the matter up.
>
> **THE COURT**: I think he cleared it up himself when he said it was commuted to time served. Is that what you said?
>
> **NELSON**: Yes, sir.
>
> **THE COURT**: Does that answer your question? It was commuted to time served. It's not a pardon. Do you agree, Mr. Keaton?
>
> **DEFENSE COUNSEL**: Well that's the way it sounds to me.
>
> **THE COURT**: That's what he said in this last statement.
>
> **DEFENSE COUNSEL**: All right.

*Nelson v. Lockhart*, 641 F.Supp. at 182-83.

The prosecutor, who had the burden of proof, moved unflinchingly ahead without verifying the authenticity of the state's proof. The state now attempts to blame the defendant for not proving the pardon. This conveniently overlooks that the state had the burden of proof. Nevertheless, it is clear the trial court had no motion or objection to strike the state's proof of the invalid conviction. As Judge Eisele observed:

> The truth is that the state could not have provided any evidence to rebut the petitioner's contention because it did not exist. The Arkansas Supreme Court has clearly held that the prosecutor must carry the significant burden of ferreting out information regarding the validity of prior convictions whenever he seeks enhancement. *Roach v. State*, 255 Ark. 773, 778, 503 S.W.2d 467 (1973). It is the prosecutor who can and should check out the validity of the convictions he wishes to rely on. The state's responsibility to thoroughly investigate its claims in a criminal proceeding is always acute. And this should be especially evident to prosecutors who seek to send someone to the penitentiary for a term of 20 to 40 years on a predicate felony involving the theft of $45.00. They may ignore this incumbent obligation at the peril of their case for enhancement.



question was indeed submitted to the jury, Nelson had not engaged in any misconduct. For example, the petitioner did not deceive the court or the prosecutor as to the status of the pardoned conviction. In fact, he did all he could have been expected to do to make the court and prosecutor aware of his pardon. Responsibility for the evidence submitted remained with the prosecution.

Third, the *Mandel* case, upon which the state relies heavily, is inapplicable. In *Mandel* there was a "vast volume of evidence . . ." 591 F.2d at 1373. By contrast, the State of

Arkansas had introduced only four felony convictions in this case. In addition, *Mandel* was concerned with needless multiplicity of evidence, and the rule in that case was concerned with the competency of appellate courts to act as triers of fact. Neither of these concerns are raised in this case because there was no repetitious or duplicative evidence submitted on the habitual offenders count nor is there any difficulty for the appellate court in determining if the pardoned conviction was inadmissible. It unarguably was not admissible. Without the fourth conviciton, the state has failed to provide sufficient evidence. Thus, even if we were to adopt *Mandel*, which we do not, the rule in that case would not support the state's position.

Finally, we reject the state's argument because the district court was correct in its application of ***Bullington v. Missouri***. As stated earlier, ***Bullington*** held that the Double Jeopardy Clause was invoked where "the sentencing procedure at petitioner's first trial was like the trial on the question of guilt or innocence . . ." *Id.* at 446, 101 S.Ct. at 1862. The statute in question is an evidentiary statute which requires the state to prove Nelson's prior felonies beyond a reasonable doubt. *Nelson v. Lockhart*, 641 F.Supp. at 179.[7]

[7]The procedure used in sentencing under the habitual offender act supports a finding that double jeopardy attached. Arkansas law construes the habitual offender act as a statute allowing the jury to enhance punishment for an underlying felony, *Finch v. State*, 262 Ark. 313, 317, 556 S.W.2d 434, 436, (1977), and not as a distinct offense, *Harrison v. State*, 287 Ark. 102, 104, 696 S.W.2d 501, 502 (1985). Even though the habitual offender statute merely served to enhance Nelson's sentence, however, the sentencing procedure constituted a trial on the issue of punishment. That is, the jury had to decide whether the prosecutor had proved beyond a reasonable doubt that the defendant had committed four felonies. Furthermore, and as is required under the habitual offender act, the defendant was given the opportunity to controvert the state's evidence. Because of the similarities between the trial on the underlying felony and the hearing on sentencing, *Bullington v. Missouri*, 45 U.S. at 446, 101 S.Ct. at 1862 bars a second trial on enhancement of punishment.



The Fifth Circuit has addressed the issue we are faced with and held in ***Briggs v. Procunier***, 764 F.2d 368, 372 (5th Cir. 1985) that double jeopardy attaches to an initial hearing on a defendant's status as an habitual offender:

> We hold that double jeopardy prevented the retrial of Briggs as an habitual offender even though the state alleged different prior felonies in its second indictment. • • • In other words, once the state has failed to prove that the defendant is an habitual offender with respect to one predicate offense, for example, the burglary here, it may not seek to sentence him as an habitual offender for that underlying crime. *Briggs*, 764 F.2d at 372-73.[8]

We adopt the reasoning in *Briggs*. Accordingly, the judgment and order of the district court are affirmed.[9]

[8]Several cases from the Fifth Circuit Court of Appeals hold that where the state has failed to prove a prior conviction, double jeopardy precluded retrial under a recidivist statute. *See Briggs v. Procunier*, 764 F.2d 368 (5th Cir. 1985); *French v. Estelle*, 692 F.2d 1021 (5th Cir. 1982), *cert. denied*, 461 U.S. 937, 103 S.Ct. 2108, 77 L.Ed.2d 313 (1983); *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982), *vacated on other grounds*, 459 U.S. 1139, 103 S.Ct. 776, 74 L.Ed.2d 987 (1983). The state urges that these decisions, however, did not involve the admission of inadmissible evidence at trial, the exclusion of which would have tainted the factual findings and rendered them insufficient. In each case, however, the evidence as submitted was patently insufficient to support the convictions. *See Briggs*, 764 F.2d at 369 (after jury empaneled, state dismissed enhancement counts barred by double jeopardy); *French*, 692 F.2d at 1350 (failure to prove defendant's identity as convicted felon in a prior conviction rendered evidence insufficient to support findings as an habitual criminal.) Because the evidence as submitted at Nelson's sentencing was insufficient, the rationale of these Fifth Circuit decisions supports our holding.

[9]Because ***Bullington*** applies, a second trial on the issue of sentence enhancement is barred. Accordingly, Nelson's sentence will be reduced to remove the prejudice stemming from the habitual offender act. Arkansas state courts would treat the matter similarly. Upon finding defects in the prosecutor's proof as to prior felonies,

Arkansas courts reduce the defendant's punishment to the minimum possible sentence. *Leggins v. State*, 267 Ark. 293, 297, 590 S.W.2d 22, 24 (1979); *McConahay v. State*, 257 Ark. 328, 331-32, 516 S.W.2d 887, 889 (1974); *Roach v. State*, 255 Ark. 773, 779, 503 S.W.2d 467, 471 (1973). Reductions in sentencing were typically contingent upon the prosecution's decision not to retry the case. *Leggins v. State*, 267 Ark. at 297, 590 S.W.2d at 25; *McConahay v. State*, 257 Ark. at 331-32, 516 S.W.2d at 889; *Roach v. State*, 255 Ark. at 779, 503 S.W.2d at 471.



## Supreme Court of the United States

No. A-364

A. L. LOCKHART, Director, Arkansas Department of Corrections ..... *Applicant*

v.

Johnny Lee NELSON

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ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 31, 1987.

/s/ Harry A. Blackmun
Associate Justice of the Supreme Court of the United States

Dated this 9th day of November, 1987.

## United States Court of Appeals
### FOR THE EIGHTH CIRCUIT

**JUDGMENT**

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| No. 86-1872EA | • | |
| | • | |
| Johnny Lee Nelson, | • | |
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| Appellee, | • | |
| | • | |
| v. | • | Appeal from the United States |
| | • | District Court for the |
| A. L. Lockhart, etc., | • | Eastern District of Arkansas. |
| | • | |
| Appellant. | • | |
| | • | |

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment and order of the district court are affirmed in accordance with the opinion of this Court.

September 3, 1987

A true copy.
ATTEST: Clerk, U.S. Court of Appeals, Eighth Circuit

MANDATE ISSUED 11/19/87